

City of Arlington
State of Virginia

I, David Graceson, declare as follows:

1. I am an employee with the Transportation Security Administration and currently hold the position of Senior Sensitive Security Information Program Officer for the Agency's Sensitive Security Information Office within the Office of the Special Counselor.

2. I did not participate in the decision to propose and/or remove Robert MacLean from his Federal Air Marshal position. I only became aware of the disciplinary decisions about MacLean as part of this Merit Systems Protection Board proceeding.

I declare under penalty of perjury that the information contained herein is true and correct.

Executed on July 31, 2006.

/s/ original signature to follow

David Graceson

U.S. Department of Homeland Security
San Francisco, CA



Transportation
Security
Administration

June 22, 2006

Peter Noone, Esq.
Avery Dooley Post & Avery LLP
Via Facsimile 617-489-0085 (2 pages)

Re: Outstanding Personnel Issues and Discovery
MacLean v. DHS, MSPB Docket No. SF-0752-06-0611-I-1

Dear Mr. Noone:

Personnel Issues. Your client has not yet completed exit procedures required for payment of any accrued annual leave. These procedures call for an in-person security debriefing meeting with Special Agent in Charge Frank Donzanti, as well Mr. MacLean's completion of various forms, such as the TSA Clearance Form and the SF312 Classified Information Nondisclosure Agreement. Because no aspects of the MSPB appeal will be discussed with Mr. MacLean, your client should make arrangements directly with Assistant Special Agent in Charge Chuck Orman, so that TSA can process any payments due.

Discovery. As the Agency prepares its responses to Appellant's discovery requests, it appears that many requests are objectionable because they are either overbroad, seek irrelevant information, and/or require the divulging of Sensitive Security Information (SSI).

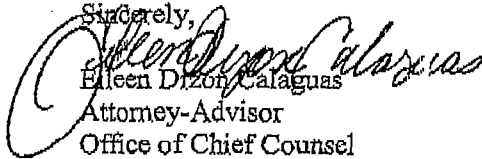
For example, discovery requests regarding Mr. MacLean's media appearance and the Agency's policy and practices regarding such is irrelevant because the Agency did not base its final disciplinary decision on such conduct. Rather, TSA based its decision on admitted conduct that Complainant volunteered during his May 4, 2005 interview. See Tab 4(J) of Agency File. To that end, deponent David Adams's testimony appears irrelevant. Adams is the Special Agent in Charge for the Federal Air Marshal's Office of Public Affairs and is located in Reston, Virginia. In that capacity, Adams had no role in assessing SSI violations or any disciplinary actions; nor was Adams consulted in Brock Meeks' news articles dated July 29, 2003 and July 30, 2003, that Mr. MacLean provided to the Agency.

Also, absent an offer of proof, Roger Schofield's testimony appears irrelevant. He is a supervisory Federal Air Marshall in Las Vegas, but at no time was Mr. MacLean in Schofield's direct chain of command. Schofield also had no role in either the creation or dissemination of the subject text message regarding Remain Overnight (RON) missions.

Discovery requests regarding who drafted this text RON message and its actual effect on any RON missions are irrelevant. Instead, the parties may be able to stipulate to whether the text message was sent, when the message was sent, to whom the message was sent, from whom the message was sent, the manner in which it was sent, and the message's context.

Finally, I propose that the parties' depositions take place from August 1-3, in Irvine, California and, as necessary, telephonically. Deponent Frank Donzanti has a scheduled vacation during the 2nd week of August, from August 8-14. Please provide me an estimated time for the deposition of Donzanti and David Graceson, who as the Senior SSI Program Officer, also will likely testify as the Agency's "person most knowledgeable" regarding Sensitive Security Information. Graceson is located in Arlington, Virginia. The Agency will take MacLean's deposition in-person and reserves the right to notice any other depositions, after reviewing Appellant's discovery responses.

Sincerely,



Eileen Dizon Calaguas
Attorney-Advisor
Office of Chief Counsel

1001 Bayhill Drive, 2nd Floor
San Bruno, CA 94066
650-616-4113 (office)
650-616-4201 (facsimile)
eileen.calaguas@dhs.gov

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ROBERT J. MACLEAN,)
)
Appellant,)
)
v.)
)
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION,)
)
Agency.)

DOCKET NUMBER:
SF-0752-06-0611-I-1

ADMINISTRATIVE
JUDGE:
Philip D. Reed

July 10, 2006

AGENCY RESPONSES TO COMBINED INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED BY APPELLANT TO THE AGENCY

The Transportation Security Administration (TSA or Agency) provides the following responses to Appellant's Combined Interrogatories and Requests for Production of Documents ("Discovery Requests"), according to the parties' stipulation for an extension of time in which to respond.

GENERAL OBJECTIONS

1. The Agency objects to Appellant's Discovery Requests to the extent they seek information protected by the attorney-client privilege, the deliberative process privilege or any other applicable privilege, or the attorney work product doctrine.
2. The Agency objects to Appellant's Discovery Requests to the extent they are vague, ambiguous, overbroad and unduly burdensome, or seek information not relevant to the issues in this proceeding.
3. The Agency objects to Appellant's Discovery Requests to the extent they seek information that is available in the Agency File that was previously provided to Appellant.
4. The Agency objects to Appellant's Discovery Requests to the extent they seek information within the possession of Appellant or that could be readily obtained by him.
5. The Agency objects to Appellant's Discovery Requests to the extent that they seek information protected from disclosure by the Privacy Act, 5 U.S.C. § 552a, or otherwise unduly interferes with the privacy rights of others.

-
6. The Agency objects to Appellant's Discovery Requests to the extent that they seek sensitivity security information protected from disclosure to non-covered parties, notwithstanding Appellant's and his counsel agreement to use such information solely in connection with this litigation.
 7. The Agency objects to Appellant's Discovery Requests to the extent that they exceed the limit of thirty in number, including all discrete subparts.
 8. The Agency reserves the right to supplement its responses herein upon further discovery.

The above general objections are hereby incorporated into each and every individually numbered response as if set forth therein.

AGENCY RESPONSES

Interrogatory No. 1.

Please provide the name, title, and position of each and every employee who drafted, prepared, reviewed and authorized the release of the text message that the Agency charges Appellant with having disclosed to the media.

The Agency objects to this request on the grounds of irrelevancy. The Agency further objects to this request on the grounds that it seeks Sensitive Security Information protected from disclosure. Without waiving these objections, the Agency responds as follows: Assistant to Special Agent in Charge Michael Lum received and followed instructions to send the subject text message.

Interrogatory No. 2.

Please identify each and every person by name, address and place of employment, who will or may be called by the Agency as a witness in this litigation, and describe specifically the area or areas of expected testimony; the documents to be relied upon, if any; and state whether the persons so designated will or will not be an expert witness, and if so state the substance of the facts and opinions to which each such expert is expected to testify and a summary of the grounds for such opinion of each expert.

The Agency may call the following individuals as witnesses in this litigation:

Frank Donzanti, Special Agent in Charge, Los Angeles Field Office for the Federal Air Marshal Service, P.O. Box 51522, Irvine, CA 92619. He is the deciding official and relies upon the Agency File and the supervisory file that he maintained on this matter.

David Graceson, Senior SSI Program Officer, 601 South 12th Street, Arlington, VA 22202, will rebut Appellant's allegations that the subject text message was not Sensitive Security Information, as described in Agency policies and regulations.

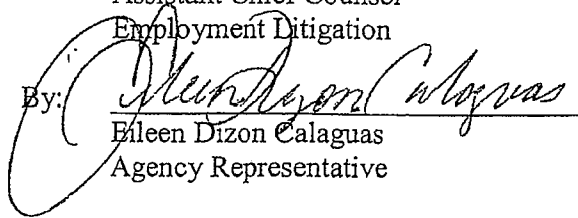
Douglas Hladky, Assistant Special Agent in Charge, Las Vegas Field Office for the Federal Air Marshal, 6380 S. Valley View Blvd. #338, Las Vegas, NV 89118. He was one of Appellant's

Respectfully Submitted,

Robin S. Wink
Assistant Chief Counsel
Employment Litigation

July 10, 2006

By:


Eileen Dizon Calaguas
Agency Representative

CERTIFICATE OF SERVICE

I certify that the attached discovery requests was sent as indicated this day to each of the following:

Appellant

Via U.S. Mail

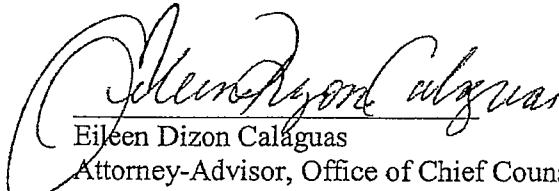
Robert J. MacLean
11 Knotty Oak Circle
Coto de Caza, CA 92679

Appellant's Representative

Via U.S. Mail

Peter H. Noone, Esq.
Avery, Dooley, Post & Avery, LLP
(617) 489-0085

July 10, 2006


Eileen Dizon Calaguas
Attorney-Advisor, Office of Chief Counsel
Transportation Security Administration
Western Area Mission Support Center
1001 Bayhill Drive, Second Floor
San Bruno, CA 94066
(650) 616-4113 (office)
(650) 616-4201 (facsimile)
eileen.calaguas@dhs.gov

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

ROBERT J. MACLEAN,
Appellant,

DOCKET NUMBER
SF-0752-06-0611-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 21, 2006

ORDER ON DISCOVERY MOTIONS

The parties have made various motions related to discovery, and have filed subsequent pleadings related thereto. All of their pending motions are addressed in this order.¹

Deposition of Thomas Quinn; Subpoena Duces Tecum. In this regard, I have considered the Appellant's Motion For Issuance of a Subpoena Duces Tecum for Former FAMS Director Thomas D. Quinn, dated and filed July 21, 2006, *see* Initial Appeal File (IAF), Tab 8;² the appellant's amended motion by the same title, dated July 31, 2006 and received August 1, 2006, *id.*, Tab 12; and the agency's opposition thereto, dated and received July 31, 2006. *Id.*, Tab 13.

¹ On August 16, 2006, I received from the appellant a request to hold a telephonic status conference on the issues presented in these motions. After reviewing the pleadings I find that this would not advance the proceeding. The request is denied.

² These references to the Board's appeal file are included for the convenience of the Board.

I find that Mr. Quinn may have personal knowledge or documents that are reasonably calculated to lead to the discovery of admissible evidence pertaining to the issues presented in this appeal, *see* 5 C.F.R. § 1201.73(a) (scope of discovery); e.g., whether there was undue pressure to remove the appellant for reasons other those stated in the decision letter, and whether the appellant's allegedly protected disclosures influenced that decision in any way. The motion is therefore GRANTED, and a subpoena will issue. See below for instructions pertaining to this motion.

Appellant's Motion To Compel. In this regard, I have considered the Appellant's Motion To Compel, dated and filed July 21, 2006, IAF, Tab 9, and the agency's opposition thereto, dated and received July 31, 2006. *Id.*, Tab 14.

Interrogatory 2. The agency states that it has supplemented its response, but it does not say how it did so. *Id.*, Tab 14, at 1. As to this interrogatory the motion is GRANTED, with regard to a specific description of this witnesses' proposed testimony. The motion is DENIED as to the additional information requested under "Appellant's Argument," insofar as this information was not specifically requested from the agency before the motion was filed.

Request for Production 12. The motion is GRANTED as to this request. It is well-settled that a party asserting an evidentiary privilege has the burden of establishing it. *See Danko v. Department of Defense*, 5 M.S.P.R. 426, 428-29 (1981). To bear that burden the agency must identify any documents responsive to this request, for which privilege is claimed; identify the privilege being asserted, and describe each document with enough specificity to allow me to rule whether the privilege applies, if a further motion to compel is filed. It is so ORDERED. Please see below for implementing orders regarding the agency's response.

Interrogatories 9, 10; Request for Production 17. The motion is DENIED as to these items. The reasons for the agency's decision to cancel RON missions

are not relevant either to the charge or the choice of penalty. The appellant's defense of whistleblowing may be precluded on other grounds with respect to his disclosure of this decision;³ but in any event, the protected status of this disclosure depends solely on information that was already known by, or available to him when he made this disclosure.⁴ Thus, I find that the information that he seeks would not be relevant to any issue presented in this appeal.

Interrogatory 13, 20, 26; Request For Production 27. The agency states that it has supplemented its responses to Interrogatories 20 and 26, and Request 27. IAF, Tab 14, at 4, 6. The motion is DENIED as to these items. I find that the agency's responses are adequate.

Request For Production 25; Interrogatory 27. The agency states that it has supplemented its response as to both of these items. *Id.*, Tab 14, at 4-5, 7. In any event, I find that these items are overbroad. The motion is DENIED as to these items.

Interrogatory 25. Again the agency states that it has supplemented its response. *Id.*, Tab 14, at 5-6. I find that the appellant has failed to show that the information sought therein is relevant to any issue presented in this appeal. The motion is DENIED as to this item.

Protective Order. In this regard, I have considered the Agency's Motion For Protective Order And To Quash Notice of Depositions dated and received July 31, 2006, *id.*, Tab 15; the agency's supporting Exhibit 3, received on August

³ See 5 U.S.C. § 2302(b)(8) (excludes from protection any disclosure "specifically prohibited by law...").

⁴ See *LaChance v. White*, 174 F.3d 1378, 1381 (Fed.Cir. 1999), *cert. denied*, 120 S. Ct. 1157 (Feb. 22, 2000) (to determine whether a protected disclosure occurred, "the proper test is... Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence" one of the types of wrongdoing described in 5 U.S.C. § 2302(b)(8), e.g., a violation of law, rule or regulation?)

1, 2006, *id.*, Tab 16; the appellant's opposition dated August 10, 2006, and received August 11, 2006. *Id.*, Tab 17; and the agency's reply dated and received August 15, 2006. *Id.*, Tab 18.

Deposition of Graceson. The agency's motion is DENIED as to this witness, and the deposition may proceed. The question presented in this appeal is not whether the applicable SSI order, or any portion thereof, is valid; rather, the question is whether a certain text message falls within the scope of the order. I am not convinced that this issue is reviewable in any forum other than the Board at this juncture; moreover, it is an element of the agency's burden of proof on the charge proper. Thus, it is a proper subject for discovery.

Deposition of Adams. The motion is DENIED with respect this witness, because it may be that he can shed some light on the appellant's claim that he was removed in retaliation for his anonymous television appearance, which he characterizes as whistleblowing protected under 5 U.S.C. § 2302(b)(8). The deposition may proceed.

Deposition of Schofield. The motion is DENIED in part. This witness allegedly had conversations with the appellant about the agency's reasons for canceling RON missions, prior to the appellant's allegedly protected disclosure regarding this issue. Again, protection may be precluded on other grounds, *see* 5 U.S.C. § 2302(b)(8); but if not, the substance of these conversations could be relevant to whether his subsequent disclosure was protected. Thus, the witness may be deposed regarding those conversations.

In all other respects the motion is GRANTED. The reasons for the agency's decision to cancel RON missions are not relevant to any question presented in this appeal, as explained earlier in this order. The witness shall not be deposed as to the reasons for that decision, except insofar as they were discussed with the appellant prior to his allegedly protected disclosure relating thereto. So ORDERED.

Further Orders. I further ORDER as follows:

(1) The parties shall promptly meet and confer, preferably with input from Mr. Quinn and his counsel, if any, to determine a convenient date, time and location for Mr. Quinn's deposition and procedures applicable thereto. See 5 C.F.R. § 1201.75. If, after a good faith effort, the parties cannot reach agreement on these matters I will make an order resolving them.⁵ Once they are resolved the appellant shall immediately let me know the date, time and location of the deposition, so that I may issue the subpoena duces tecum that he requests. The appellant shall be responsible for service of the subpoena with payment of applicable fees and expenses, per Board regulations.

(2) The agency shall provide further discovery responses as ordered above, to be received in the office of the agency's representative no later than September 8, 2006. If the appellant seeks to compel a further response he may do so by filing a motion to that effect.

(3) Deadlines established in my "Order Re Discovery" dated May 22, 2006, at paragraphs entitled "Discovery Cutoff" and "Motions to Compel," and extended by my "Order Suspending Case Processing" dated June 21, 2006, are further extended as follows:

Discovery in this matter shall be completed within the time limits set forth in 5 C.F.R. § 1201.73(d), but in any event, no later than September 29, 2006. 5 C.F.R. § 1201.73(d)(5). All responses to discovery shall be received by the requesting party, and all depositions completed on or before that date. Any motion to compel discovery shall be filed within the time limits set forth at 5

⁵ Please note that I will be absent from the office, and therefore unavailable for this purpose from September 11-22, 2006. The parties should therefore expedite their discussions on these matters. They should also be aware that I will not respond to telephone calls during this, or any other deposition, seeking a ruling on any disagreements that may arise. Thus, they should make their best effort to raise and resolve them before the deposition begins.

C.F.R. § 1201.73(d)(4); except that I will not consider any such motion that is received in this office and the office of the opposing representative after October 6, 2006. Any opposition to a motion to compel discovery shall be filed within the time limits set forth in the same regulation; except that I will not consider any opposition that is received in this office after October 13, 2006.

All other orders and deadlines remain in effect.

FOR THE BOARD:

Philip D. Reed
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail

Robert J. MacLean
11 Knotty Oak Circle
Coto de Caza, CA 92679

Appellant Representative

Electronic Mail

Peter H. Noone, Esq.
Avery, Dooley, Post & Avery, L.L.P.
90 Concord Avenue
Belmont, MA 02478

Agency Representative

Facsimile

Eileen Dizon Calaguas, Esq.
Department of Homeland Security
Transportation Security Administration
San Francisco Mission Support Center
1001 Bayhill Drive
Second Floor
San Bruno, CA 94066-3061

August 21, 2006

(Date)

Rebecca Huey
Legal Assistant

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

ROBERT J. MACLEAN,
Appellant,

DOCKET NUMBER
SF-0752-06-0611-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: September 8, 2006

**ORDER DENYING AGENCY MOTIONS, FOLLOWED BY A
SUGGESTION...**

***Croft* Issue.** The agency seeks reconsideration of orders permitting the appellant to depose David Graceson. Cited is *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989). The appellant has not yet filed any objection, nor has his time to do so expired. 5 C.F.R. § 1201.55(a). I will be out of the country for the next two weeks, and in light of what follows, I find it unnecessary to delay resolution of this matter pending receipt of the appellant's opposition, if any.

Croft involved disclosure of classified information relating to national security. This case involves disclosure of sensitive information relating to transportation security. While transportation security is required, in part, for reasons of national security, that is not its only purpose. It is therefore unclear whether the holding in *Croft* applies to this case. Moreover, this may remain unclear, for the following reasons.

For the moment I assume, *arguendo*, that the Board may review the agency's determination that the information disclosed by the appellant was covered under the regulation at issue. Once the record is fully developed, I may well agree with that determination. If so, then the agency will have no reason to

seek review of my decision to address the issue. Hence, the question of reviewability may prove to be moot.

In any event: The question is a close one, and I choose not to foreclose discovery in the assumption that one view or the other would prevail on petition for review to the full Board.

“Final Order” Issue. After the appellant’s removal, and after the appellant filed the instant appeal, and after I had made the order allowing Mr. Graceson’s deposition, the agency issued a “Final Order” dated August 31, 2006, determining that the appellant’s disclosure is covered under the regulation at issue. A right of review is provided in the U.S. Court of Appeal pursuant to 49 U.S.C. § 46110.

The agency could have made such a Final Order before it proposed the appellant’s removal, and could have based its proposal on the determination therein. Had it done so I would likely have agreed that the determination itself was not reviewable by the Board. Instead, it chose to make an ad hoc determination that was not a Final Order, and was not appealable per se, and removed the appellant on that basis. In general, the Board will not sustain an agency action on the basis of a charge that could have been brought, but was not. *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981). By analogy I question whether a Final Order, issued after the fact, can foreclose Board review of an earlier, non-appealable determination on which the agency chose to ground an action appealable to the Board.

Again, the issue is debatable and it may well be moot for reasons explained in the preceding section. I therefore choose to err, if at all, on the side that will create a more complete record.

The motion for reconsideration is therefore DENIED.

Motion To Certify. The agency also moves to certify for interlocutory appeal my adverse ruling, if any, on the question of whether 49 U.S.C. § 46110

precludes Board review of its determination that the information disclosed by the appellant constitutes Sensitive Security Information.

Pursuant to 5 C.F.R. § 1201.91, “The judge may permit the [*interlocutory*] appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board’s immediate attention.” *Id.* A judge may certify a ruling for interlocutory appeal “only if the record shows that: (a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.” 5 C.F.R. § 1201.92.

I find that an immediate ruling on the issue in question will not materially advance the completion of the proceeding; rather, it will delay the proceeding to consider an issue that may well prove to be moot, for reasons explained above. I find further that denial of an immediate ruling will not cause undue harm to a party or the public for any of the reasons cited by the agency, or for any other reason that I can discern from this record. Accordingly, the motion to certify is DENIED. *Id.*

A Suggestion... If the appellant chooses to seek review of the agency’s Final Order pursuant to 49 U.S.C. § 46110, I will entertain a joint motion to dismiss this appeal without prejudice to await resolution of that matter in the Court of Appeals. Absent such a motion all orders, deadlines and scheduled dates remain in effect.

It is so ORDERED.

FOR THE BOARD:

Philip D. Reed
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail

Robert J. MacLean
11 Knotty Oak Circle
Coto de Caza, CA 92679

Appellant Representative

Electronic Mail &
Facsimile

Peter H. Noone, Esq.
Avery, Dooley, Post & Avery, LLP
Attorneys at Law
90 Concord Avenue
Belmont, MA 02478

Agency Representative

Facsimile

Eileen Dizon Calaguas, Esq.
Department of Homeland Security
Transportation Security Administration
San Francisco Mission Support Center
1001 Bayhill Drive
Second Floor
San Bruno, CA 94066-3061

September 8, 2006

(Date)

Rebecca Huey
Legal Assistant